

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ SEP 07 2018 ★

LONG ISLAND OFFICE

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NERVON GAYLES,

Plaintiff,

-against-

ARMOR CORRECTIONAL HEALTH SERVICES and
MICHAEL SPOSATO, Sheriff of Nassau County Jail,

Defendants.
-----X

ORDER
16-CV-1356 (JFB)(SIL)

JOSEPH F. BIANCO, District Judge:

On March 11, 2016, *pro se* plaintiff Nervon Gayles (“plaintiff”) commenced this civil rights action pursuant to 42 U.S.C. § 1983 against defendants Armor Correctional Health Services (“Armor”) and then-Nassau County Sheriff Michael Sposato. On December 5, 2017, Armor filed a motion to dismiss plaintiff’s complaint. By Order dated April 23, 2018, the Court referred Armor’s motion to Magistrate Judge Steven I. Locke for a Report and Recommendation.

On August 15, 2018, Magistrate Judge Locke issued a Report and Recommendation (“R&R,” Dkt. No. 37), recommending that Armor’s motion to dismiss be granted and that plaintiff’s complaint be dismissed as to all defendants without prejudice and with leave to amend. A copy of the R&R was served on plaintiff on August 16, 2018. (*See* Dkt. No. 38.) The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of its receipt. (R&R at 14.) The deadline for filing any objections has since passed, and no party has objected to the R&R.

Where there are no objections, the Court may adopt a report and recommendation without *de novo* review. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress

intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *see also Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision."); *cf.* 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. *See Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) ("[B]ecause the waiver rule is non jurisdictional, we 'may excuse the default in the interests of justice.'" (quoting *Thomas*, 474 U.S. at 155)).

Although no party has objected to the R&R, the Court has conducted a *de novo* review of the R&R in an abundance of caution. Having conducted a review of the record and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the thorough and well-reasoned R&R in its entirety.

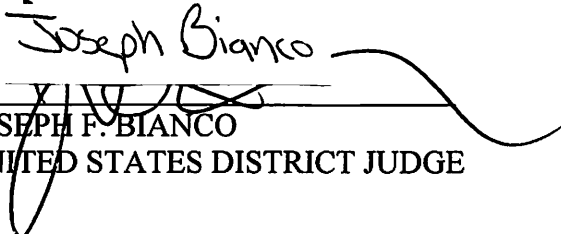
Accordingly, IT IS HEREBY ORDERED that Armor's motion to dismiss (Dkt. No. 20) is granted, and that plaintiff's complaint is dismissed as to all defendants without prejudice. The Court grants plaintiff leave to submit an amended complaint, which must be filed within forty-five (45) days from the date of this Order.

IT IS FURTHER ORDERED that counsel for Armor shall serve a copy of this Order on plaintiff and file proof of service with the Court.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order

would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of any appeal. See *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.



JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: September 7, 2018
Central Islip, New York